



DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 83

[2231A2100DD/AAKC001030/A0A501010.999900]

RIN 1076-AF67

Federal Acknowledgment of American Indian Tribes

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Proposed rule.

SUMMARY: This proposed rule seeks input on continuation of an express prohibition on re-petitioning under the U.S. Department of the Interior's (Department) regulations for Federal acknowledgment of Indian Tribes. When first promulgated in 1978, the acknowledgment regulations did not provide a regulatory path that allowed re-petitioning, and since 1994, the regulations have expressly prohibited petitioners who have received a negative final determination from the Department from re-petitioning (ban). The most recent update to the regulations in 2015 continued this ban, but two Federal district courts held that the Department's stated reasons for implementing the ban, as articulated in the 2015 final rule updating the regulations (2015 final rule), were arbitrary and capricious, and remanded to the Department for further consideration. The Department has undertaken further consideration and is proposing to maintain the ban, albeit with revised justifications, in light of the Federal district courts' orders. The Department seeks input on this proposal and the basis for its proposal.

DATES: Please submit your comments by July 6, 2022. Consultation sessions with federally recognized Indian Tribes will be held on Thursday, June 2, 2022, 3 p.m. to 5 p.m. ET and Monday, June 6, 2022, 2 p.m. to 4 p.m. ET. A listening session for present, former, and prospective petitioners will be held on Thursday, June 9, 2022, 3 p.m. to 5 p.m. ET.

ADDRESSES: We cannot ensure that comments received after the close of the comment period (see DATES) will be included in the docket for this rulemaking and considered. Comments sent to an address other than those listed below will not be included in the docket for this rulemaking. All comments received may be posted without change to <https://www.regulations.gov>, including any personal information provided. You may submit comments by any of the following methods:

- Federal rulemaking portal: <https://www.regulations.gov>. Follow the instructions for submitting comments.
- E-mail: consultation@bia.gov. Include the number 1076-AF67 in the subject line of the message.
- Consultation with Indian Tribes. The Department will conduct two virtual consultation sessions and will accept oral and written comments. Federally recognized Indian Tribes may register for the Thursday, June 2, 2022, 3 p.m. to 5 p.m. ET consultation session at: <https://www.zoomgov.com/meeting/register/vJIsu2prz4pHbtqqZn0-5f8oRU5jEYKGDg>. Federally recognized Indian Tribes may register for the Monday, June 6, 2022, 2 p.m. to 4 p.m. ET consultation session at: <https://www.zoomgov.com/meeting/register/vJIsdu-opjMtHR5nht0X2HKcjOh35Oz23SU>.
- Listening session for present, former, and prospective petitioners. The Department will host a listening session for present, former, and prospective petitioners and will accept oral and written comments. Present, former, and prospective petitioners may register for the Thursday, June 9, 2022, 3 p.m. to 5 p.m. ET listening session at: <https://www.zoomgov.com/meeting/register/vJIscoGpqj8uG09-rMrR2FeecAzGmJmf78s>.

FOR FURTHER INFORMATION CONTACT: Steven Mullen, Federal Register Liaison, Office of Regulatory Affairs & Collaborative Action – Indian Affairs, (202) 924-2650, RACA@bia.gov.

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I. Statutory Authority

Congress granted the Assistant Secretary—Indian Affairs (then, the Commissioner of Indian Affairs) authority to “have management of all Indian affairs and of all matters arising out of Indian relations.”¹ This authority includes the authority to administratively acknowledge Indian Tribes.² The Congressional findings that supported the Federally Recognized Indian Tribe List Act of 1994 expressly acknowledged that Indian Tribes could be recognized “by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated ‘Procedures for Establishing that an American Indian Group Exists as an Indian Tribe,’” and described the relationship that the United States has with federally recognized Indian Tribes.³

¹ 25 U.S.C. 2 and 9, and 43 U.S.C. 1457.

² See, e.g., *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 211 (D.C. Cir. 2013); *James v. United States Dep’t of Health & Human Servs.*, 824 F.2d 1132, 1137 (D.C. Cir. 1987).

³ See Public Law 103-454, Sec. 103(2), (3), (8) (Nov. 2, 1994).

II. History of this Rulemaking

The regulations that codify the process through which a group may petition the Department for acknowledgment as a federally recognized Indian Tribe are at 25 CFR part 83 (part 83). The regulations require groups petitioning for Federal acknowledgment to meet seven mandatory criteria, the satisfaction of which has been central to the Federal acknowledgment process since its inception.⁴ The Department refers to the seven criteria as the (a) “Indian Entity Identification” criterion, (b) “Community” criterion, (c) “Political Authority” criterion, (d) “Governing Document” criterion, (e) “Descent” criterion, (f) “Unique Membership” criterion, and (g) “Congressional Termination” criterion.⁵

First promulgated in 1978 at 25 CFR part 54 (1978 regulations), the Federal acknowledgment regulations were subsequently revised in 1994 and moved to part 83 (1994 regulations). The 1978 regulations did not provide a regulatory path that allowed re-petitioning, and since 1994, part 83 has expressly prohibited petitioners who have received a negative final determination from the Department from re-petitioning under part 83.⁶

In a 2014 notice of proposed rulemaking (2014 proposed rule), the Department proposed giving previously denied petitioners a limited opportunity to re-petition.⁷ The 2014 proposed rule proposed to allow re-petitioning only if:

- Any third parties that participated as a party in an administrative reconsideration or Federal Court appeal concerning the petitioner has consented in writing to the re-petitioning; and
- The petitioner proves, by a preponderance of the evidence, that either:
 - A change from the previous version of the regulations to the current version of the regulations warrants reconsideration of the final determination; or
 - The “reasonable likelihood” standard was misapplied in the final determination.⁸

⁴ 25 CFR 83.11(a)–(g) (2015 version of the criteria); *id.* § 83.7(a)–(g) (1994) (1994 version); *id.* § 54.7(a)–(g) (1978) (1978 version).

⁵ 25 CFR 83.5.

⁶ 25 CFR 83.3(f) (1994); 59 FR 9280, 9294 (Feb. 25, 1994).

⁷ 79 FR 30766, 30767 (May 29, 2014).

⁸ 25 CFR 83.4(b)(1) (proposed 2014); *see also* 79 FR 30774 (containing the proposed provision).

In the preamble of the 2014 proposed rule, the Department explained that the requirement of third-party consent would “recognize[] the equitable interests of third parties that expended sometimes significant resources to participate in the adjudication [of a final determination in a reconsideration or appeal] and have since developed reliance interests in the outcome of such adjudication.”⁹ The Department did not discuss the extent to which the third-party consent condition might limit the number of re-petitioners.¹⁰

Similarly, the Department did not specify the extent to which the other conditions listed above—requiring a denied petitioner to prove that either a change in the regulations or a misapplication of the reasonable likelihood standard warrants reconsideration—might limit the number of re-petitioners. However, as a general matter, the Department noted that “the changes to the regulations are generally intended to provide uniformity based on previous decisions,” so the circumstances in which re-petitioning might be “appropriate” would be “limited.”¹¹ The proposed rule did not identify any change to the seven mandatory criteria that “would likely change [any negative] previous final determination[s].”¹²

Ultimately, in the 2015 final rule updating part 83, the Department expressly continued the ban.¹³ In the preamble of the rule, the Department explained that “[t]he final rule promotes consistency, expressly providing that evidence or methodology that was sufficient to satisfy any particular criterion in a previous positive decision on that criterion will be sufficient to satisfy the criterion for a present petitioner.”¹⁴ Additionally, the Department explained that “[t]he Department has petitions pending that have never been reviewed” and that “[a]llowing for re-petitioning by denied petitioners would be unfair to petitioners who have not yet had a review.”¹⁵

⁹ 79 FR 30767.

¹⁰ See *Burt Lake Band of Ottawa and Chippewa Indians v. Bernhardt*, No. 17-0038 (ABJ), 2020 WL 1451566, at *11 (D.D.C. Mar. 25, 2020) (noting that the record “does not provide statistics to show . . . how many [petitioners] would be able to re-apply under the limited proposed exception”). On reconsideration, the Department has identified eleven denied petitioners that would have been subject to the third-party consent condition under the 2014 proposed rule: Duwamish Indian Tribe, Tolowa Nation, Nipmuc Nation (Hassanamisco Band), Webster/Dudley Band of Chaubunagungamaug Nipmuck Indians, Eastern Pequot Indians of Connecticut, Paucatuck Eastern Pequot Indians of Connecticut, Schaghticoke Tribal Nation, Golden Hill Paugussett Tribe, Snohomish Tribe of Indians, Chinook Indian Tribe/Chinook Nation, and Ramapough Mountain Indians, Inc.

¹¹ 79 FR 30767.

¹² *Id.*

¹³ 25 CFR 83.4(d); see 80 FR 37861, 37888-89 (July 1, 2015).

¹⁴ 80 FR 37875.

¹⁵ *Id.*

Finally, the Department explained that re-petitioning “would hinder the goals of increasing efficiency and timeliness by imposing the additional workload associated with re-petitions on the Department, and [the Office of Federal Acknowledgment] in particular.”¹⁶

In 2020, two Federal district courts – one in a case brought by a former petitioner seeking acknowledgement as the Chinook Indian Nation¹⁷ and one in a case brought by a former petitioner seeking acknowledgement as the Burt Lake Band of Ottawa and Chippewa Indians¹⁸ – held that the Department’s stated reasons for implementing the ban, as articulated in the preamble to the 2015 final rule revising part 83,¹⁹ were arbitrary and capricious under the Administrative Procedure Act (APA). As an initial matter, both courts agreed with the Department that the Department’s authority over Indian affairs generally authorized a re-petition ban.²⁰ In addition, both courts noted that their review is highly deferential to the agency’s decision under applicable tenets of administrative law.²¹ As a result, the narrow question left for the courts to decide was whether the Department, in retaining the ban in the 2015 final rule, “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”²²

Both courts concluded that the Department had not done so. The *Chinook* court held that the Department’s reasons were “illogical, conclusory, and unsupported by the administrative record,” as well as not “rationally connect[ed] . . . to the evidence in the record.”²³ Similarly, the *Burt Lake* court concluded that the Department’s reasons were “neither well-reasoned nor rationally connected to the facts in the record.”²⁴ Both courts found that despite the Department’s argument that the 2015 revisions to part 83 did not change any substantive criteria other than

¹⁶ *Id.*

¹⁷ *Chinook Indian Nation v. Bernhardt*, No. 3:17-cv-05668-RBL, 2020 WL 128563 (W.D. Wash. Jan. 10, 2020).

¹⁸ *Burt Lake Band of Ottawa and Chippewa Indians v. Bernhardt*, No. 17-0038 (ABJ), 2020 WL 1451566 (D.D.C. Mar. 25, 2020).

¹⁹ 80 FR 37861 (July 1, 2015).

²⁰ *Chinook*, 2020 WL 128563, at *6 (stating that “the Court agrees with Department of the Interior (DOI) that its expansive power over Indian affairs encompasses the re-petition ban” (citation omitted)); *Burt Lake*, 2020 WL 1451566, at *5 (stating that “the regulation [banning re-petitioning] comports with the agency’s authority”).

²¹ *Chinook*, 2020 WL 128563, at *7 (citation omitted); *Burt Lake*, 2020 WL 1451566, at *6 (citation omitted).

²² *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

²³ *Chinook*, 2020 WL 128563, at *8.

²⁴ *Burt Lake*, 2020 WL 1451566, at *12.

those specifically identified, the Department had nevertheless failed to explain why, in light of those and other revisions and after having proposed a limited re-petition process in the 2014 proposed rule, the Department could permissibly maintain the ban.²⁵ The *Chinook* court focused in particular on a provision introduced in the 2015 final rule that sought to promote consistent implementation of the criteria and stated that “[t]here is no reason why new petitioners should be entitled to this ‘consistency’ while past petitioners are not.”²⁶ More generally, the *Burt Lake* court linked reform of the [F]ederal acknowledgment process with an “opportunity to re-petition and to seek to satisfy the new criterion.”²⁷ Neither the *Chinook* nor *Burt Lake* courts struck down the 2015 final rule in whole or in part. Rather, both courts remanded the ban to the Department for further consideration.

On December 18, 2020, the Department announced its intent to reconsider the ban and invited federally recognized Indian Tribes to consult on whether to retain the ban or allow for re-petitioning. On February 25, 2021, the Department held a Tribal consultation session and solicited written comments on the ban through March 31, 2021. In response, the Department received 19 comments from federally recognized Indian Tribes, non-federally recognized groups, an inter-Tribal organization representing both federally recognized and State recognized Indian Tribes, various State and town representatives in Connecticut, and individuals. A majority of the commenters opposed the ban.

Following the comment period, the Department reviewed all comments and identified three options: (1) keeping the ban in place; (2) creating a fact-based or time-limited avenue for re-petitioning; and (3) giving denied petitioners an opportunity to re-petition with few or no limitations. After considering each of these options, the history of the ban, the Federal district court opinions noted above, the comments received (which, as noted above, were predominantly opposed to the ban), and the legal foundation for the ban, the Department is proposing a

²⁵ See *Chinook*, 2020 WL 128563, at *4–5 (identifying five “notable” changes in the 2015 regulations); *Burt Lake*, 2020 WL 1451566, at *9 (highlighting two changes that the court deemed “not minor”).

²⁶ *Chinook*, 2020 WL 128563, at *8.

²⁷ *Burt Lake*, 2020 WL 1451566, at *10.

continuation of the ban, for the reasons described here. The Department invites comments, particularly from denied petitioners, on its proposed approach as well as its reasoning.

III. Basis for Proposed Rule

The Department is proposing to continue the ban on re-petitioning, albeit with a revised justifications given the *Chinook* and *Burt Lake* courts' conclusion that the explanation for implementing the ban in the 2015 final rule was arbitrary and capricious. The Department is proposing to continue the ban for five main reasons: (1) the Department's previous negative final determinations are substantively sound and the Department is allowed to revise its regulations without reevaluating past final agency actions issued under the previous versions of those regulations; (2) denied petitioners received due process by virtue of the multiple administrative and Federal court avenues through which to challenge both the process and substance of a negative part 83 final determination; (3) the changes adopted in the Department's 2015 final rule do not warrant re-petitioning; (4) third parties and the Department have legitimate interests in the finality of the Department's final determinations; and (5) a denied petitioner's claimed availability of new evidence is not a compelling basis to allow re-petitioning. Each of these reasons is explained in more detail here.

A. The Department's Previous Negative Final Determinations Are Substantively Sound and the Department Is Allowed to Revise Its Regulations Without Reevaluating Past Final Agency Actions Issued Under the Previous Versions of Those Regulations.

The Department proposes to retain the ban on re-petitioning on the grounds that its previous negative final determinations are substantively sound, and the Department should be able to maintain the ability to improve its regulations without being required to reexamine previous decisions. In the 2015 final rule, the Department noted that the Federal acknowledgment process "has been criticized as 'broken' and in need of reform" for being "too slow (a petition can take decades to be decided), expensive, burdensome, inefficient, intrusive,

less than transparent and unpredictable.”²⁸ While the Department has reformed various aspects of part 83, the Department has maintained the validity of the seven mandatory criteria. Indeed, throughout the preamble of the 2015 final rule, the Department emphasized the part 83 process’s integrity and substantive rigor.²⁹

In support of the Department’s proposed approach, we note that each of the Department’s 34 negative determinations was based on an exhaustive review of the facts and claims specific to each petitioner and a deliberate application of the criteria, resulting in a well-reasoned, legally defensible outcome. The Department’s efforts in the 2015 final rule “to address assertions of arbitrariness,”³⁰ among other criticism, do not amount to an admission that its previous final determinations were somehow defective and, therefore, now deserving of reconsideration. Indeed, if an agency’s revision of regulations amounted to an admission that previous determinations were defective, an agency would never revise its regulations.

Complaints that the Federal acknowledgment process under the previous versions of the regulations was “too slow. . . , expensive, burdensome, inefficient, intrusive, less than transparent and unpredictable,”³¹ primarily concern procedural aspects of the process. The Department has consistently defended, and courts have consistently upheld, the Department’s final determinations on the merits.³² By contrast, the cases in which courts have sided with denied petitioners have primarily concerned not the merits of the Department’s evaluations but issues

²⁸ See *id.* at 37862.

²⁹ See, e.g., *id.* at 37863 (explaining why the 2015 final rule’s reduced documentary burden for satisfying criteria (b) and (c) will not compromise the existing “integrity and rigor of the process”).

³⁰ *Id.*

³¹ *Id.* at 37862.

³² See *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 220-23 (D.C. Cir. 2013) (holding that the Department’s final determination finding insufficient evidence for criteria (a) and (b) was not arbitrary and capricious); *Miami Nation of Indians of Ind., Inc. v. U.S. Dep’t of the Interior*, 255 F.3d 342, 349 (7th Cir. 2001) (holding that the Department did not arbitrarily disregard evidence alleged to support a positive finding); *Ramapough Mountain Indians, Inc. v. Norton*, 25 Fed. App’x 2, 3 (D.C. Cir. 2001) (holding that the Department permissibly concluded that the petitioner failed to meet criterion (e) because of a lack of documentation); *Tolowa Nation v. United States*, 380 F. Supp. 3d 959, 961 (N.D. Cal. 2019) (holding that the Department’s determination that the petitioner failed to satisfy criterion (b) did not violate the APA); *Nipmuc Nation v. Zinke*, 305 F. Supp. 3d 257, 271–77 (D. Mass. 2018) (holding that the Department’s determination finding that the petitioner failed to meet criteria (a)–(c) and (e) was not arbitrary or capricious); *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389, 412–18 (D. Conn. 2008); *Miami Nation of Indians of Ind., Inc. v. Babbitt*, 112 F. Supp. 2d 742, 758 (N.D. Ind. 2000) (upholding the underlying validity of part 83 writ large), *aff’d sub nom. Miami Nation of Indians of Ind., Inc. v. U.S. Dep’t of the Interior*, 255 F.3d 342 (7th Cir. 2001).

relating to process,³³ which the Department has continued to address through its reforms, as discussed elsewhere.

Further, a rule requiring the Department to reevaluate its negative determinations after any amendment to part 83, no matter the strength of those determinations, the due process already afforded to the denied petitioners, the improbability of reversal, or legitimate interests in finality (discussed below), would hamper the Department's ability to improve the Federal acknowledgement process. The mere fact that the regulations changed does not inherently require Departmental reconsideration of previous decisions. Indeed, such an approach would effectively render an agency unable to modify regulations for concern that all decisions prior to amendment would need to be redecided.

B. Denied Petitioners Received Due Process.

The Department proposes a no re-petitioning approach because in the event that a denied petitioner claims that the Department inconsistently or otherwise unfairly applied the criteria to its petition, that petitioner already had the opportunity to raise such a claim in a timely manner during administrative reconsideration or judicial review of its negative determination. Having had such an opportunity, our approach is that previously denied petitioners should not be entitled to another evaluation under the 2015 regulations.

Since the inception of the Federal acknowledgment process, the Department has ensured that petitioners have multiple opportunities to submit and revise their petitions, receive and respond to technical assistance from Office of Federal Acknowledgment (OFA), address deficiencies in their materials, and supplement their evidence, all before receiving a proposed finding and, ultimately, a final determination.³⁴ Indeed, one of the reasons why the Federal

³³ See *Greene v. Babbitt*, 64 F.3d 1266, 1275 (9th Cir. 2005) (affirming a ruling in favor of the Samish Indian Nation, which had challenged the adequacy of due process under the 1978 regulations); *Hansen v. Salazar*, No. C08-0717-JCC, 2013 WL 1192607, at *11 (W.D. Wash. Mar. 22, 2013) (holding that the AS-IA's final determination denying the Duwamish Indian Tribe's petition for Federal acknowledgment was arbitrary and capricious because the Department had evaluated the petition under only the 1978 regulations, even though it had evaluated a contemporaneous petition under both the 1978 and 1994 regulations).

³⁴ See 59 FR 9280, 9291 (Feb. 25, 1994) (explaining that "petitioners who were denied went through several stages of review with multiple opportunities to develop and submit evidence"); see also 25 CFR 83.10(c)(1) (1994) (giving a petitioner additional technical assistance upon request prior to active consideration of the petition).

acknowledgment process can be so lengthy is that petitioners often take many years to prepare their petitions, supplementing them with supporting documentation before deeming them complete and ready for Departmental review.

Prior to issuance of a final determination, our regulations have always allowed petitioners to challenge a negative proposed finding by presenting factual or legal arguments and evidence relied upon in the proposed finding in various administrative processes.³⁵ Following issuance of a final determination, petitioners denied under the 1994 regulations had the option to seek reconsideration with the Interior Board of Indian Appeals (IBIA),³⁶ while the 1978 regulations permitted the Secretary of the Interior to order administrative reconsideration.³⁷ Both the 1978 and 1994 regulations permitted reconsideration in response to a concern that the Department erroneously evaluated evidence.³⁸ The 1994 regulations further allowed denied petitioners to allege that “there are reasonable alternative interpretations, not previously considered, of the evidence used for the final determination, that would substantially affect the determination that the petitioner meets or does not meet one or more of the criteria.”³⁹ We believe that such provisions, permitting either the Secretary or the IBIA to review the merits of a negative final determination, provided due process protections for aggrieved petitioners.

Furthermore, a denied petitioner alleging an APA, constitutional, or other violation in its final determination had the opportunity to seek judicial review. To the extent that petitioners did not challenge a negative final determination in court, the Department proposes not to create a re-petition process as a substitute for a timely APA claim.

C. The Changes Adopted in the Department’s 2015 Final Rule Do Not Warrant Re-petitioning at this Time.

³⁵ 25 CFR 83.10(i) (1994); *id.* § 54.9(g) (1978). *See also James*, 824 F.2d at 1136 (describing a review under the 1978 regulations in which the Department initially issued a negative proposed finding to the Wampanoag Tribe of Gay Head (Aquinnah), but after “accept[ing] additional evidence challenging the proposed finding and after reconsidering the matter,” issued a final determination acknowledging the petitioner).

³⁶ 25 CFR 83.11 (1994).

³⁷ *Id.* § 54.10 (1978).

³⁸ *Id.* § 83.11(d)(2) (1994); *Id.* § 54.10(c)(2) (1978).

³⁹ *Id.* § 83.11(d)(4) (1994).

The Department proposes to not allow for re-petitioning under the 2015 regulations because the Department believes the changes do not warrant re-petitioning. First, none of the 2015 final rule’s changes to each of the seven mandatory criteria justify re-petitioning, and the 2015 final rule did not change the reasonable likelihood standard that the Department applies in evaluating petitions for Federal acknowledgment. Further, even if the outcome of any of the Department’s previous determinations would be different under the 2015 regulations, the Department believes it retains the authority to revise its regulations without reevaluating its previous determinations.

1. None of the 2015 final rule’s changes to the seven mandatory criteria justify re-petitioning.

According to the Federal district court that decided *Chinook* and remanded the ban to the Department for further consideration, some or all of the changes in the 2015 final rule constitute “significant revisions that could prove dispositive for some re-petitioners.”⁴⁰ Although the *Chinook* court did not specify whether or how any such revision would affect any specific petitioner, the court identified changes in the 2015 final rule that it deemed “notable”: (1) a new “evaluation start date for criteria (b) [(Community)] and (c) [(Political Authority)]”; (2) a new ability “to rely on self-identification as an Indian tribe” for criterion (a) (Indian Entity Identification); (3) an “automatic satisfaction of criterion (e) [(Descent)] . . . through evidence of ‘a tribal roll directed by Congress or prepared by the Secretary . . . unless significant countervailing evidence establishes that the tribal roll is substantively inaccurate’”; and (4) a “[l]oosening [of] the requirements for criterion (f) [(Unique Membership)].”⁴¹ Additionally, the *Burt Lake* court likewise remanded the ban to the Department and identified another change in the 2015 final rule that it deemed “not minor”: the change in how the Department counts the

⁴⁰ *Chinook*, 2020 WL 128563, at *8.

⁴¹ *Id.* at *4–5 (citations omitted).

number of marriages within a petitioner for the purpose of evaluating criterion (b)

(Community).⁴²

This section of the proposed rule primarily seeks to explain that the changes that the *Chinook* and *Burt Lake* courts identified as potentially significant would not result in the reversal of the Department's previous negative final determinations.

i. The new evaluation start date of 1900 for criteria (b) (Community) and (c) (Political Authority).

In the 2015 final rule, the Department provided a thorough, well-reasoned explanation as to why the Department “does not classify the start date change, from 1789 or the time of first sustained contact to 1900, as a substantive change to the existing criteria,”⁴³ and the Department adopts that explanation here. Aside from reducing the documentary burden on petitioners, the Department reasoned that a 1900 start date for criteria (b) (Community) and (c) (Political Authority) is appropriate because “the time since 1900 has been shown to be an effective and reliable demonstration for historical times for criterion (a)” (Indian Entity Identification), and “utilization of [a 1900 start date for criterion (a)] for over 20 years has demonstrated that the date maintains the rigor of the criteria.”⁴⁴ In explaining why the 1900 start date will not compromise the rigor of the process, the Department stated that “1900 [was] squarely during the allotment and assimilation period of Federal policy that was particularly difficult for tribal governments,” when “there was little benefit and some risk to openly functioning as a tribal community and government.”⁴⁵

The Department proposes to not allow re-petitioning because the change to the start date for criteria (b) (Community) and (c) (Political Authority) would not result in the reversal of any previous negative determination. None of the 34 denied petitioners received a negative determination based solely on a failure to satisfy criterion (b) or (c) for the historical period (pre-

⁴² *Burt Lake*, 2020 WL 1451566, at *9.

⁴³ 80 FR 37863 (July 1, 2015); *see also id.* at 37868–69.

⁴⁴ *Id.* at 37863.

⁴⁵ *Id.* at 37869.

1900). That is, every petitioner that failed to satisfy criterion (b) or (c) for the historical period also failed to satisfy the criterion for the period from 1900 until the present.⁴⁶ Therefore, the change in the start date for criteria (b) and (c) would not lead to a different outcome for any denied petitioner.

ii. The new ability to rely on evidence of self-identification as an Indian Tribe for criterion (a) (Indian Entity Identification).

In the 2015 final rule, the Department characterized the change in criterion (a) as substantive.⁴⁷ Nevertheless, the change does not compel the Department to allow re-petitioning because none of the Department's negative determination hinged on criterion (a) alone.⁴⁸ Specifically, every denied petitioner that failed to satisfy criterion (a) failed to satisfy criteria (b) and (c) as well.⁴⁹ A reversal of a negative conclusion on criterion (a) in a previous determination would not change the overall negative result, given that a petitioner must satisfy all seven mandatory criteria.⁵⁰

iii. The satisfaction of criterion (e) (Descent) through evidence of a Tribal roll directed by Congress or prepared by the Secretary.

In the 2015 final rule, the Department explained that “[t]he final criterion (e) remains substantively unchanged from the current criterion (e).”⁵¹ Although the revised language of the criterion emphasizes the “great weight” that the Department places “on applicable tribal Federal rolls prepared at the direction of Congress or by the Department,” the rule explains that the

⁴⁶ Cf. *id.* at 37863 (explaining that the converse is also true: “based on [the Department’s] experience in nearly 40 years of implementing the regulations, every group that has proven its existence from 1900 forward has successfully proven its existence prior to that time as well”).

⁴⁷ *Id.* at 37863.

⁴⁸ See *id.* at 37866 (noting the point raised by some commenters that “because no petitioner has been denied solely on [criterion (a)], it is of limited value”).

⁴⁹ Based on the Department’s review on reconsideration, there are 22 denied petitioners that did not meet criterion (a), all of which also did not meet at least one other criterion. They are the Duwamish Indian Tribe, Georgia Tribe of Eastern Cherokees, Inc., Juaneno Band of Mission Indians, Steilacoom Tribe, Nipmuc Nation (Hassanamisco Band), Webster/Dudley Band of Chaubunagungamaug Nipmuck Indians, St. Francis/Sokoki Band of Abenakis of Vermont, Golden Hill Paugussett Tribe, Snohomish Tribe of Indians, Muwekma Ohlone Tribe of San Francisco Bay, Chinook Indian Tribe/Chinook Nation, MaChis Lower AL Creek Indian Tribe, Tchinouk Indians, Southeastern Cherokee Confederacy, Northwest Cherokee Wolf Band, Red Clay Inter tribal Indian Band, United Lumbee Nation of NC and America, Principal Creek Indian Nation, Kaweah Indian Nation, Munsee Thames River Delaware, Lower Muskogee Creek Tribe-East of the Mississippi, and Creeks East of the Mississippi.

⁵⁰ See *Ramapough Mountain Indians*, 25 Fed. App’x at 3–4 (declining to address the petitioner’s arguments relating to criterion (b), after upholding the Department’s conclusion that the petitioner failed to meet criterion (e), “because to receive Federal recognition [the petitioner] had to demonstrate that it met all seven of the criteria in section 83.7”).

⁵¹ 80 FR 37866 (July 1, 2015).

revision “codifies past practice.”⁵² As the 2015 final rule points out, since the inception of the Federal acknowledgment regulations, the Department has consistently relied on evidence of such rolls in evaluating whether a petitioner satisfies criterion (e).⁵³ The change in § 83.11(e)(1) ensures that the Department will continue to do so.

**iv. The deletion of the requirement in criterion (f) (Unique Membership)
that the petitioner’s members “not maintain a bilateral political
relationship with” a federally recognized Indian Tribe.**

Under the 1994 regulations, criterion (f) listed three conditions that, if all met, exempted a petitioner from the requirement that “[t]he membership of the petitioning group [be] composed principally of persons who are not members of any acknowledged North American Indian tribe.”⁵⁴ The conditions were as follows: (1) “the [petitioner] . . . has functioned throughout history until the present as a separate and autonomous Indian tribal entity”; (2) “its members do not maintain a bilateral political relationship with the acknowledged tribe;” and (3) “its members have provided written confirmation of their membership in the petitioning group.”⁵⁵ The 2015 revision of part 83 deleted the second condition in this list but maintained the first and the third.⁵⁶

In the preamble of the 2015 final rule, the Department adequately explained the rationale behind deleting that condition.⁵⁷ In short, the Department’s evaluation of whether a group can establish a substantially continuous Tribal existence, demonstrate that it has functioned as an autonomous entity throughout history until the present, and thus qualify for Federal acknowledgment, does not hinge on a petitioner’s demonstration that its members eschew bilateral relationships with an acknowledged Indian Tribe. No previous final determination (whether negative or positive) has hinged on that specific determination.⁵⁸ Given that that

⁵² *Id.* at 37867.

⁵³ *Id.* (discussing the Department’s reliance on rolls and censuses prepared by Federal agency officials in reaching a favorable conclusion on criterion (e) for the Timbisha Shoshone Tribe’s positive final determination).

⁵⁴ 25 CFR 83.7(f) (1994).

⁵⁵ *Id.*

⁵⁶ 80 FR 37891 (July 1, 2015).

⁵⁷ *See id.* at 37873.

⁵⁸ *See id.* (explaining that the San Juan Southern Paiute Tribe of Arizona met the essential requirement for Federal acknowledgment—“operat[ing] as a separate politically autonomous community on a substantially continuous basis”—“even though its members had census

condition was non-essential, its deletion did not affect any previous petitioner's rights or determination and its deletion does not counsel in favor of allowing re-petitioning.

v. The change in how the Department counts the number of marriages within a petitioner for criterion (b) (Community).

To satisfy criterion (b) under the 2015 regulations, a petitioner must “comprise[] a distinct community and demonstrate[] that it existed as a community from 1900 until the present.”⁵⁹ Like the 1994 regulations, the 2015 regulations list various kinds of evidence that a petitioner can rely on to demonstrate such community, including “[r]ates or patterns of known marriages within the entity”⁶⁰ and “[s]ocial relationships connecting individual members.”⁶¹ Under both the 1994 and 2015 regulations, certain kinds of evidence, standing alone, are sufficient to satisfy criterion (b) at a given point in time.⁶² One such kind of evidence under the 2015 regulations is evidence demonstrating that “[a]t least 50 percent of the members of the entity were married to other members of the entity.”⁶³ That provision is analogous to one in the 1994 regulations, which allowed petitioners to satisfy criterion (b) at a given point in time through evidence demonstrating that “[a]t least 50 percent of the marriages in the group are between members of the group.”⁶⁴

The different language in the provisions quoted above reflects a difference in methodology. Whereas Departmental practice under the 1994 regulations required counting the overall number of marriages within a petitioner, the Department under the 2015 regulations counts instead “the number of petitioner members who are married to others in the petitioning group.” Although the rule characterizes the change as substantive,⁶⁵ given that it represents a change in OFA’s actual evidentiary approach (as opposed to a procedural process or codification

numbers with a federally recognized tribe,” the Navajo Nation (citing Notice of Final Determination That the San Juan Southern Paiute Tribe Exists as an Indian Tribe, 54 FR 51502, 51504 (Dec. 15, 1989))).

⁵⁹ 25 CFR 83.11(b); 80 FR 37890 (July 1, 2015).

⁶⁰ 25 CFR 83.11(b)(1)(i).

⁶¹ *Id.* § 83.11(b)(1)(ii).

⁶² *Id.* § 83.11(b)(2); *id.* § 83.7(b)(2) (1994).

⁶³ *Id.* § 83.11(b)(2)(ii).

⁶⁴ *Id.* § 83.7(b)(2)(ii) (1994).

⁶⁵ 80 FR 37863 (July 1, 2015).

of unwritten but consistent past practice), the Department noted in the 2015 final rule that either approach of counting marriages is valid: the approach used in the 1994 regulations or the approach used in the 2015 regulations.⁶⁶ Consequently, to the extent that any of the Department's conclusions on criterion (b) in previous determinations applied the 1994 regulations' method of counting marriages, the Department proposes that those conclusions were fair and remain valid, and the change in method should not serve as a basis for re-petitioning. Furthermore, the Department has not identified any negative determination in which the switch in method would reverse the Department's conclusion.

- vi. The inclusion of a new provision under criteria (b) (Community) and (c) (Political Authority) stating that evidence of “[l]and set aside by a State for petitioner, or collective ancestors of the petitioner,” may be relied on to satisfy those criteria.⁶⁷**

In the 2015 final rule, the Department stated that the addition of the provision quoted above does not reflect a substantive change in the criteria.⁶⁸ Rather, “this change is simply meant to be explicit about the value and relevance of certain evidence.”⁶⁹ The list of evidence under criterion (c)(1), where the new provision is located, is not exhaustive; rather, the items listed are only examples of what the Department will accept, and has accepted in the past. The Department also emphasized that even if the existence of such lands “may generate evidence of community and political influence/authority,” such lands “are not determinative for these two criteria.”⁷⁰ That is, such evidence acts as one of many factors relevant to a positive determination.

- 2. The 2015 final rule did not change the reasonable likelihood standard that the Department applies in evaluating petitions for Federal acknowledgment.**

⁶⁶ *Id.* at 37870.

When the Department revised the Federal acknowledgment regulations in 1994, it introduced language clarifying the burden of proof that the Department applies in determining whether evidence satisfies the seven mandatory criteria. In § 83.6(d) (1994), the Department explained that “[a] criterion shall be considered met if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion.”⁷¹ The so-called “reasonable likelihood” standard did not create a new evidentiary standard; rather, it “codif[ied] current practices” applied under the 1978 regulations as well.⁷²

The 2015 regulations retained the reasonable likelihood standard, in language virtually identical to that in the 1994 regulations, stating that “[t]he Department will consider a criterion... to be met if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion.”⁷³ Notwithstanding that express continuity from 1978 to 1994 to 2015, the plaintiffs in the *Chinook* and *Burt Lake* litigation argued that a separate provision introduced in the 2015 regulations, located at § 83.10(a)(4), changed the reasonable likelihood standard by reducing the burden of proof for petitioners proceeding under the 2015 regulations. Section 83.10(a)(4) states that “[e]vidence or methodology that the Department found sufficient to satisfy any particular criterion in a previous decision will be sufficient to satisfy the criterion for a present petitioner.”

By its plain terms, § 83.10(a)(4) expressly “provides that if there is a prior decision finding that evidence or methodology was sufficient to satisfy any particular criterion in a previous petition, the Department will find that evidence or methodology sufficient to satisfy the criterion for a present petitioner. In other words, a petitioner today satisfies the standards of evidence or baseline requirements of a criterion if that type or amount of evidence was sufficient in a previous decision.”⁷⁴ The Department’s inclusion of § 83.10(a)(4) in the 2015 regulations should not be interpreted as an admission that the Department weighed evidence or applied

⁷¹ 59 FR 9295 (February 25, 1994).

⁷² *Id.* at 9280.

⁷³ 25 CFR 83.10(a).

⁷⁴ 80 FR 37865 (July 1, 2015).

methodology in an inconsistent manner in its past determinations. Rather, it is simply an assurance of consistency going forward.

The Department decided to provide such assurance in the 2015 final rule because it aligned with the Department’s stated goal in the 2015 final rule to promote consistency.

The 2015 final rule’s inclusion of § 83.10(a)(4)—and the decision not to define the term “reasonable likelihood” in a novel way in the 2015 final rule—promotes consistency with the Department’s past applications of the reasonable likelihood standard, in furtherance of the Department’s stated goals, and, more broadly, promotes consistency with the Department’s previous determinations.⁷⁵ In clarifying the Department’s understanding and application of this standard, § 83.10(a)(4) addresses a concern raised by some commenters that the Department was allegedly applying an “increasingly burdensome application of the criteria” over time.⁷⁶

D. Third Parties and the Department Have Legitimate Interests in the Finality of the Department’s Final Determinations.

1. Third parties have legitimate interests in finality.

In the preamble of the 2015 final rule, the Department explained that numerous commenters argued that re-petitioning would “undermine[] finality and certainty” and “[be] unfair to stakeholders.”⁷⁷ Although the Department referred to those comments in the final rule, in rejecting the Department’s stated reasons for retaining the ban under the APA, the *Chinook* court stated that the Department failed to incorporate those potentially appropriate concerns into its justifications for the ban.⁷⁸

Upon reconsideration, the Department proposes to consider those third-party interests as compelling in favor of retaining the ban.

⁷⁵ *Id.* at 37875.

⁷⁶ *Id.* at 37865; *see also id.* at 37862 (“This clarification ensures that a criterion is not applied in a manner that raises the bar for each subsequent petitioner.”).

⁷⁷ *Id.* at 37874.

⁷⁸ *Chinook*, 2020 WL 128563, at *9 (“The Court does not judge the appropriateness of these goals, but if they actually motivated DOI’s decision the[] agency should have said so directly.”).

For decades, third parties with interests in the Department's Federal acknowledgment process have relied on the finality of the Department's final determinations. These third parties include federally recognized Indian Tribes, States, local governments, other actual or potential part 83 petitioners, and the public at large. Since the initial promulgation of the Federal acknowledgment regulations, the Department's final determinations have constituted final agency action, subject to administrative reconsideration or judicial review under generally understood principles of administrative law.⁷⁹ Third parties have an understanding of how the process works based on the step-by-step description in part 83 culminating in the issuance of a final determination.

The ban has been a longstanding feature of the process, underscoring the seriousness of the Department's evaluation, legitimizing the substantive rigor of the process, and ensuring, as a matter of law, the finality of the Department's final determinations. While denied petitioners may argue the changes in the 2015 final rule might change the result of a negative final determination, such arguments do not warrant undermining the finality of the Department's final determinations and disregarding the interests of third parties in finality.

And the Department proposes that those interests are significant. Federal acknowledgment is one of the most significantly consequential actions the Department takes in any context. Placement on the list of federally recognized Indian Tribes establishes a government-to-government relationship between the petitioner and the United States that has innumerable consequences for the newly acknowledged Indian Tribe and for third parties. For the Department and other Federal agencies, it requires that the newly acknowledged Indian Tribe be made eligible for all Federal benefits and programs benefitting Indians, that the agencies include those entities in any relevant Tribal consultation, and that the agencies consider the

⁷⁹ See 25 CFR 54.10(a) (1978) ("The Assistant Secretary's decision shall be final for the Department"); 25 CFR 83.10(o) (1994) ("The determination to decline to acknowledge that the petitioner is an Indian tribe shall be final for the Department."); *id.* § 83.44 ("The AS-IA's final determination is final for the Department and is a final agency action under the [APA].").

sovereign rights of those entities when making taking agency actions.⁸⁰ For other recognized Indian Tribes, it makes the newly acknowledged Indian Tribe eligible for Tribal-specific Federal resources. For States and localities, acknowledgment changes legal considerations including Tribal sovereign immunity and environmental regulation. Similar concerns affect individuals who choose to live or seek employment within the newly acknowledged Indian Tribe's jurisdiction or choose to become members of the newly acknowledged Indian Tribe. The depth of these consequences underscores the reason that the Department has historically allowed limited third-party participation in the part 83 process, and emphasizes the interests that third parties have in administrative finality so that relevant government agencies (Federal, State, and Tribal) and individuals may reasonably settle expectations as to whether a given petitioner may or may not still participate in the part 83 process.

The compelling third-party interests in precluding re-petitioning and any ensuing litigation of issues already decided should give the Department's final determinations preclusive effect. The Supreme Court has "long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality."⁸¹ Although the 2014 proposed rule would have conditioned re-petitioning on the consent of "[a]ny third parties that participated as a party in an administrative reconsideration or Federal Court appeal concerning the petitioner,"⁸² the 2015 final rule's blanket ban aligns more closely with the well-established, common-law principle of administrative final action preclusion and the repose that it provides. Additionally, such protection extends to a greater number of third parties with significant interests in the outcomes of requests to re-petition.

2. The Department has legitimate interests in finality.

⁸⁰ E.O. 13175, Consultation and Coordination with Indian Tribal Governments, 65 FR 67249, 67249–50 (Nov. 6, 2000) (ordering Federal agencies to develop procedures for "regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications").

⁸¹ *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991); see also *Golden Hill Paugussett Tribe of Indians v. Rell*, 463 F. Supp. 2d 192, 200 (D. Conn. 2006) (concluding that a final determination on Federal acknowledgment is an "adjudicative" one, sufficient for application of the collateral estoppel doctrine").

⁸² 79 FR 30774 (May 29, 2014) (proposed § 83.4(b)(1)).

i. The burden on the Department.

The Department proposes this approach on the belief that it has a legitimate interest in the finality of its final determinations. Rules of preclusion serve not only to prevent an unjust imposition “upon those who have already shouldered their burdens” but also to prevent the drain on “resources of an adjudicatory system with disputes resisting resolution.”⁸³ “The principle holds true when a court has resolved an issue, and should do so equally when the issue has been decided by an administrative agency . . . which acts in a judicial capacity.”⁸⁴

The *Burt Lake* court observed that re-petitioning would not pose a burden on OFA given that, under the 2014 proposed rule, the Office of Hearings and Appeals (OHA) (and not OFA) would have been the office deciding whether to allow re-petitioning.⁸⁵ However, the proposed rule would have permitted OHA to “receive pleadings, hold hearings, and request evidence from OFA” prior to issuing a decision on re-petitioning.⁸⁶ Despite the court’s holding, then, the 2014 proposed rule (even if implemented) could still have involved significant OFA involvement in OHA’s review of a request to re-petition.

Furthermore, any re-petition request approved by OHA would have required OFA’s reevaluation of the petitioner’s claims. To the extent that the *Burt Lake* court presumed that OFA’s reevaluation would be somehow limited in scope—the court notes that “re-petitioners would only be able to submit new materials to the agency”—nothing in the 2014 proposed rule indicates that re-petitioners would have been treated any differently from first-time petitioners under part 83.⁸⁷ Rather, upon successful completion of OHA’s threshold review, re-petitioners would have had to submit a documented petition pursuant to § 83.21, just like first-time

⁸³ *Solimino*, 501 U.S. at 107–08 (1991) (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979)).

⁸⁴ *Id.* at 108 (citation omitted).

⁸⁵ *Burt Lake*, 2020 WL 1451566, at *12 (citations omitted).

⁸⁶ 79 FR 30767 (May 29, 2014) (proposed § 83.4(b)(2)(ii)).

⁸⁷ *Burt Lake*, 2020 WL 1451566, at 11 (citing 79 FR 30774 (May 29, 2014)).

petitioners, and proceed through the Federal acknowledgment process accordingly. In short, the burden on the Department would be significant.⁸⁸

The Department, in reconsidering the ban after the *Burt Lake* and *Chinook* decisions, considered alternatives to the ban. One such alternative was a limited evaluation of re-petitions akin to OHA's threshold review under the 2014 proposed rule, focusing on new claims and any supplemental submission of materials relevant to a previously failed criterion. However, on reconsideration, the Department proposes that even a limited reevaluation would undermine the integrity of the Federal acknowledgment process. Contrary to the *Chinook* court's observation that "OFA would only have to re-consider the aspects of the original decision that were identified as erroneous,"⁸⁹ such an evaluation would fall short of the Department's standard requiring "thorough and deliberate evaluations," given the serious nature of granting or denying a petition for Federal acknowledgment.⁹⁰ Many prospective re-petitioners received determinations that are decades old, and in the intervening time, a denied petitioner's materials, including materials relating to criteria that the petitioner had previously satisfied, could have changed significantly, affecting the petitioner's ability to satisfy those criteria at present. For example, under the 2015 regulations at § 83.11(b) and (c), a petitioner must satisfy criterion (b) (Community) and criterion (c) (Political Influence or Authority) "from 1900 until the present."⁹¹ Even if a petitioner had satisfied those criteria decades ago, and OFA's prior conclusions regarding those criteria were not identified by the petitioner as erroneous in its request to re-petition, the necessity of a thorough and deliberate evaluation would compel OFA to reevaluate those criteria for the present period, accounting for the most recent decades for which OFA has

⁸⁸ See Barbara N. Coen, *Tribal Status Decision Making: A Federal Perspective on Acknowledgment*, 37 NEW ENG. L. REV. 491, 495 (2003) ("The result of the process is a decision based on an extensive factual analysis, with administrative records currently ranging in excess of 30,000 pages to over 100,000 pages." (citing *Work of the Department of the Interior's Branch of Acknowledgment and Research within the Bureau of Indian Affairs: Hearing Before the S. Comm. on Indian Affs.*, 107th Cong. 2, 19–20 (2002) (statement of Michael R. Smith, Dir., Office of Tribal Servs., U.S. Dep't of the Interior))).

⁸⁹ *Chinook*, 2020 WL 128563, at *9.

⁹⁰ 70 FR 16513, 16514 (March 31, 2005) (explaining that the Secretary placed importance on "'thorough and deliberate evaluations' because acknowledgment decisions 'must be equitable and defensible'" (quoting Memorandum from Gale Norton, Sec'y of the Interior, U.S. Dep't of the Interior, to David Anderson, Assistant Sec'y – Indian Affs., U.S. Dep't of the Interior (Apr. 1, 2004))).

⁹¹ 25 CFR 83.11(a), (b).

incomplete information. That is, allowing limited re-petitioning would not be as simple as grafting OFA's reconsideration of denied criteria onto a previously positive determination – rather, OFA would presumably need to reevaluate the entirety of the petitioner's evidence to avoid acknowledging groups who, over time, lost compliance with previously-satisfied regulatory criteria.

In another example, a petitioner's membership may change even within a relatively short time span, therefore affecting compliance with criterion (f) (Unique Membership) at § 83.11(f). A change in membership, in turn, could affect the Department's prior conclusion on criterion (e) (Descent) at § 83.11(e), which requires a petitioner to demonstrate that its membership "consists of individuals who descend from a historical Indian tribe (or from historical Indian tribes that combined and functioned as a single autonomous political entity)."⁹²

Further, OFA would need to evaluate a re-petitioner's underlying claim to be the previous petitioner in the first instance. The Department has dealt with several cases involving dueling or otherwise overlapping petitioner claims to the same membership or historical predecessor. If the Department allowed re-petitioning, prior to getting to the merits of a re-petition request under any model, OFA would have to ensure that the re-petitioner was, in fact, the original petitioner.

In sum, an abbreviated evaluation for re-petitioners would compromise the substantive rigor of the Federal acknowledgment process.

ii. Timeliness and efficiency.

Furthermore, the Department proposes that even a limited avenue for re-petitioning would threaten the Department's ability to process existing and future petitions in a timely manner, undermining a key goal of the 2015 revision to "increase timeliness and efficiency."⁹³ The *Chinook* court stated that if the Department was "concerned about pending petitions, it would have been simple to give them priority," sending re-petitions to the back of the line.⁹⁴

⁹² *Id.* § 83.11(e).

⁹³ 80 FR 37862 (July 1, 2015).

⁹⁴ *Chinook*, 2020 WL 128563, at *9.

However, that statement does not account for the likely significant, time-sensitive administrative burden that the Department—and OFA especially—would incur as a result of allowing re-petitioning.

For example, and putting aside the burdens associated with processing re-petitions in the first instance, the creation of a re-petitioning process could potentially lead to a marked increase in the number of requests that the Department receives pursuant to the Freedom of Information Act (FOIA). When interacting with both petitioners and interested third parties, OFA has taken the position that part 83 materials submitted to the Department become Federal records for FOIA purposes and cannot simply be turned over to non-Federal parties (even petitioners) upon request. As a result, prospective re-petitioners or interested third parties likely would need to submit FOIA requests for copies of records relating to the Department’s previous final determinations in order to analyze evidence or methodology that the Department deemed sufficient or insufficient to satisfy criteria in previous determinations. While OFA maintains a list of the limited public documents associated with part 83 petitions, see generally <https://www.bia.gov/as-ia/ofa/decided-cases>, this does not include the voluminous amount of evidentiary materials part 83 petitioners submit throughout the process. Because FOIA contains statutory time limits,⁹⁵ the Department would have to prioritize responding to such requests, a potentially significant undertaking involving the review of thousands of records, many decades old.

The Department’s concern about the effect of such an administrative burden is not speculative. A 2001 report of the United States General Accounting Office noted that technical staff within the Bureau of Indian Affairs (now housed within OFA) had estimated that they spent up to 40 percent of their time on administrative responsibilities, and on responding to FOIA requests in particular, limiting their time spent evaluating part 83 petitions.⁹⁶ While the

⁹⁵ See generally U.S. DEP’T OF JUST., GUIDE TO THE FREEDOM OF INFORMATION ACT, PROCEDURAL REQUIREMENTS 32–36 (2019), <https://www.justice.gov/oip/page/file/1199421/download>.

⁹⁶ U.S. GOV’T ACCOUNTABILITY OFF., GAO-02-49, INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS 16 (2001).

Department has taken steps to alleviate that burden (for example, by hiring and training FOIA contractors), the Department has a legitimate interest in allocating resources efficiently.

Besides an increase in FOIA requests, another likely burden on OFA stemming from re-petitioning would be increased litigation. Assuming that any re-petition process would include threshold eligibility requirements, the denial of a request to re-petition would constitute a final agency action subject to APA review.⁹⁷ Similarly, an approved re-petition would presumably be subject to all applicable administrative appellate options and, if denied, APA review by the courts. The Department's interests in administrative finality extend to interests in avoiding the perpetual threat of litigation, particularly in a process that has already guaranteed petitioners significant administrative or judicial appeal opportunities and, as discussed below, legislative remedies as well.

E. Claimed Availability of New Evidence Does Not Justify Allowing Re-Petitioning.

In the preamble of the 2015 final rule, the Department noted that certain commenters supported an opportunity to re-petition if “there is significant new evidence.”⁹⁸ By choosing to retain the ban, the Department necessarily rejected that basis for re-petitioning and proposes to do so again now.

We propose that the potential availability of new evidence does not justify re-petitioning. First, echoing the discussion above regarding the due process already afforded to denied petitioners, under every version of the regulations, denied petitioners had ample opportunities to supplement their petitions with new evidence throughout the Federal acknowledgment process,⁹⁹

⁹⁷ See *Palacios v. Spencer*, 267 F. Supp. 3d 1, 7 (D.D.C. 2017) (explaining that if a party seeking review “alleged new evidence or changed circumstances that were not previously before the agency, then the agency’s denial [of reconsideration] is reviewable as a final agency action” (citation and internal quotation marks omitted)), *aff’d in part, appeal dismissed in part*, 906 F.3d 124 (D.C. Cir. 2018); *see also* 79 FR 30774 (proposed 25 CFR 83.4(b)(3)) (“The OHA judge’s decision whether to allow re-petitioning is final for the Department and is a final agency action under the [APA]”).

⁹⁸ 80 FR 37875 (July 1, 2015).

⁹⁹ See 59 FR 9291 (justifying the introduction of the ban by explaining, in part, that “[t]hose petitioners who were denied went through several stages of review with multiple opportunities to develop and submit evidence.”).

including after the Department's issuance of a proposed finding¹⁰⁰ and on reconsideration.¹⁰¹

Additionally, during the Department's evaluation, OFA staff often conducted their own research to supplement that of the petitioners,¹⁰² especially for the purpose of addressing deficiencies or gaps in the petitioners' submitted materials.¹⁰³

Second, if the Department were to allow re-petitioning based on new evidence, we propose that it would be difficult to establish defensible limiting principles for how such re-petitioning would look in practice. Re-petitioners could claim that any time limit on the ability to submit a petition based on new evidence would be inherently arbitrary given that the availability of such evidence is not static but could be discovered at any point and from any source depending on the expertise of the individual charged with collecting it.

Finally, in recent years, Congress has confirmed its willingness to recognize Indian Tribes outside of part 83.¹⁰⁴ As the Department noted in the preamble of the 1994 final rule introducing the ban, "[d]enied petitioners still have the opportunity to seek legislative recognition if substantial new evidence develops."¹⁰⁵ The Department invites comments on its reasoning and on alternative perspectives.

IV. Summary of the Proposed Rule

This proposed rule makes no changes to the regulatory text at 25 CFR part 83, and proposes to make no change specifically to § 83.4(d), which sets out the ban. Changes are made to the legal authority citation because 25 U.S.C. 479a-1 has been renumbered to 25 U.S.C. 5131

¹⁰⁰ 25 CFR 83.10(i) (1994) (allowing the petitioner or any individual or organization challenging or supporting a proposed finding to submit arguments and evidence to the AS-IA rebutting or supporting the finding); *id.* § 54.9(g) (1978) (allowing any individual or organization challenging a proposed finding "to present factual or legal arguments and evidence to rebut the evidence relied on").

¹⁰¹ *Id.* § 83.11(d)(1) (1994) (allowing petitioners to request reconsideration of a final determination with the IBIA by alleging that "there is new evidence that could affect the determination"); *id.* § 54.10(c)(1) (1978) (allowing the Secretary of the Interior to request reconsideration of a final determination if the opinion "[w]ould be changed by significant new evidence which he has received subsequent to the publication of the decision").

¹⁰² *See id.* § 83.10(a) (1994) (permitting the AS-IA to initiate research for any purpose relative to analyzing a documented petition); *id.* § 54.9(a) (1978) (same).

¹⁰³ *See* 65 FR 7052 (February 11, 2000); *see also* 70 FR 16513, 16515 (March 31, 2005) (encouraging petitioners to consult with OFA staff, in part, to reduce the number of deficiencies noted in a technical assistance letter).

¹⁰⁴ *See, e.g.*, National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116-92, sec. 2870, 133 Stat. 1198, 1907-09 (2019) (extending Federal recognition to the Little Shell Tribe of Chippewa Indians of Montana); Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017, Pub. L. 115-121, 132 Stat. 40 (2018) (extending Federal recognition to six Indian Tribes located in Virginia).

¹⁰⁵ 59 FR 9291 (February 25, 1994).

and Pub. L. 103-454 Sec. 103 (Nov. 2, 1994) has been reprinted in the United States Code at 25 U.S.C. 5130 note (Congressional Findings).

V. Procedural Requirements

A. Regulatory Planning and Review (E.O. 12866)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The E.O. directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

B. Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). It does not change current funding requirements and would not impose any economic effects on small governmental entities because it makes no change to the status quo.

C. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act because this rule affects only entities that have previously petitioned, and been denied, Federal acknowledgment as an Indian Tribe and that may again seek to become acknowledged as an Indian Tribe. This rule:

(a) Will not have an annual effect on the economy of \$100 million or more.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

(c) Will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of the U.S.-based enterprises to compete with foreign-based enterprises.

D. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector because this rule affects entities that have previously petitioned, and been denied, Federal acknowledgment as an Indian Tribe and that may again seek to become acknowledged as an Indian Tribe. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

E. Takings (E.O. 12630)

This rule does not effect a taking of private property or otherwise have taking implications under E.O. 12630. A takings implication assessment is not required.

F. Federalism (E.O. 13132)

Under the criteria in section 1 of E.O. 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. A federalism summary impact statement is not required.

G. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of E.O. 12988. Specifically, this rule: (a) meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and (b) meets the criteria of section

3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

H. Consultation with Indian Tribes (E.O. 13175)

The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in E.O. 13175 and have hosted consultation with federally recognized Indian Tribes in preparation of this proposed rule. The Department is hosting additional consultation sessions with Tribes as described in the DATES and ADDRESSES sections of this document.

I. Paperwork Reduction Act

OMB Control No. 1076-0104 currently authorizes the collection of information related to petitions for Federal acknowledgment contained in 25 CFR part 83, with an expiration of October 31, 2021. This rule requires no change to that approved information collection under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*

J. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required because this is an administrative and procedural regulation. (For further information see 43 CFR 46.210(i).) We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

K. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required.

L. Clarity of this Regulation

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- a. Be logically organized;
- b. Use the active voice to address readers directly;
- c. Use clear language rather than jargon;
- d. Be divided into short sections and sentences; and
- e. Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the ADDRESSES section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, the sections where you believe lists or tables would be useful, etc.

M. Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment – including your personal identifying information – may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

List of Subjects in 25 CFR Part 83

Administrative practice and procedure, Indians-tribal government.

For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, proposes to amend 25 CFR part 83 as follows:

PART 83—PROCEDURES FOR FEDERAL ACKNOWLEDGMENT OF INDIAN TRIBES

1. Revise the authority citation for part 83 to read:

Authority: 5 U.S.C. 301; 25 U.S.C. 2, 9, 5131; 25 U.S.C. 5130 note (Congressional

Findings); and 43 U.S.C. 1457.

2. In § 83.4, republish paragraph (d) to read as follows:

§ 83.4 Who cannot be acknowledged under this part?

* * * * *

(d) An entity that previously petitioned and was denied Federal acknowledgment under these regulations or under previous regulations in part 83 of this title (including reconstituted, splinter, spin-off, or component groups who were once part of previously denied petitioners).

Bryan Newland,

Assistant Secretary – Indian Affairs.

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